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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re L.S. et al., Persons Coming Under the Juvenile Court Law	
ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. D.T., Defendant and Appellant.	A134274 (Alameda County Super. Ct. Nos. OJ09013338, OJ06004018-2, OJ09013339)

The juvenile court dismissed this dependency case and granted sole physical custody of three children, Greg Jr. and twins L.S. and R.S., to their non-offending biological fathers. The children's mother, appellant D.T., contends the juvenile court (1) violated her due process rights by refusing to permit her to testify before issuing the order dismissing this case, and (2) abused its discretion by issuing exit orders contrary to the children's best interests. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

D.T. is the mother of twins L.S. and R.S., born in July 2004, and Greg Jr., born in May 2006 (collectively, children). D.T. is also the mother of T.T., born in August 1994, who is not involved in these proceedings. R.S. Sr. is the father of the twins and Greg Sr.

is the father of Greg Jr. (collectively, fathers). Neither father is party to these proceedings.

On September 15, 2009, respondent Alameda County Social Services Agency (the agency) filed the relevant petition for the children under section 300, subdivisions (b), (c), (g) and (j), alleging, among other things, that they (1) had suffered or faced substantial risk of suffering serious physical harm or illness as a result of D.T.'s failure to provide regular care for them due to mental illness, developmental disability or substance abuse, or D.T.'s willful or negligent failure to provide them with adequate food, clothing, shelter or medical treatment; (2) had suffered or faced substantial risk of suffering serious emotional damage as evidenced by their severe anxiety, depression, withdrawal or aggressive behavior as a result of D.T.'s conduct; (3) had been left without adequate provisions for support; and (4) had one or more siblings that had suffered or faced substantial risk of suffering abuse or neglect. This petition, among other things, alleged that D.T. was mentally ill with suicidal ideation; abused drugs and alcohol; refused to comply with prescribed medical treatment; threatened and physically and verbally abused the children; exposed the children to her sexual activities; left them without supervision at night; refused to provide for T.T.; was arrested based on her abuse of and failure to provide for T.T.; and had a history of involvement with CPS based on her failure or inability to provide adequate care for her children.

Following a hearing on December 7, 2009,the juvenile court sustained allegations pursuant to section 300, subdivisions (b) and (j), removed the children from D.T.'s custody and placed them with their respective fathers. D.T. thereafter received reunification services and was afforded frequent visitation with the children. The fathers also received reunification services.

Initially, D.T. struggled with her case plan. Among other things, D.T.'s visits with the children were inconsistent, and she at times was noncompliant with her medical treatment. In addition, acrimonious relationships between D.T. and the fathers caused problems with respect to the court-ordered visitation and appeared to cause unnecessary stress for the children. The agency reported, among other things, that D.T. had ongoing

problems with anger management, communicating with the fathers, and accepting responsibility for the children's removal. However, the children generally appeared healthy, were improving in their performance at school, and appeared increasingly bonded with their fathers and other paternal relatives.

Over time, D.T.'s compliance with her case plan improved, as did the quality and consistency of her visitation with the children. Although D.T.'s relationships with the fathers remained strained, there was some improvement and, with the help of three court-ordered mediations, parents were able to reach significant agreements with respect to visitation.

However, for the May 2011 interim review hearing, the social worker reported ongoing problems with parents adhering to the visitation schedule reached in mediation. She also reported new abuse allegations relating to the fathers' purported use of corporal punishment on the children. According to the social worker, the children themselves reported the corporal punishment, and the social worker responded by referring the fathers to parenting classes, which the fathers had not done. These referrals were evaluated out and the agency conducted an investigation which revealed no marks on the children. The juvenile court thereafter ordered parents not to physically discipline the children, stating at the end of the hearing: "I believe these are family law issues at this point but I will not dismiss today."

A series of review hearings then followed in the latter part of 2011. At this point, the agency was recommending dismissal of the case. Although parents needed to continue working on their communication skills, the children were no longer at risk and, indeed, were quite happy. No more allegations of abuse by the fathers were reported. While the agency did not object to increasing D.T.'s visitation, the social worker believed joint physical custody would be problematic and disruptive to the children due to the ongoing conflict between parents (of which the children were aware).

On August 17, 2011, D.T. filed a request pursuant to section 388 seeking the children's return to her care. The juvenile court denied her request at the August 19,

2011 status review hearing after concluding the request was not properly before the court. D.T. has not appealed this ruling.

The August 19, 2011 status review hearing was ultimately continued due to a scheduling conflict with the court. At the continued hearing on September 28, 2011, county counsel reported to the court that counsel had "been in discussion" and that "[o]n the next day, we should be able to proceed with argument and submit it to the court." The court responded: "Excellent. Thank you." At the continued hearing on October 25, 2011, D.T.'s counsel was not present, but one of the father's counsel made a special appearance on her behalf for the purpose of requesting another continuance. The court granted the request, at which point the children's counsel added, with the other counsels' approval, that "we were all going to do argument" at the next hearing. Nonetheless, when the continued hearing began on November 9, 2011, D.T. requested to provide further testimony with respect to the issues of visitation and child custody.

It was during this November 9, 2011 hearing that the juvenile court made the decisions now before us on appeal. First, the juvenile court denied D.T.'s request to give further testimony, ruling that evidence was closed and that only argument would be permitted. Then, after hearing argument from counsel, the juvenile court signed visitation and custody orders and dismissed the case. In particular, the November 9, 2011 order, among other things, granted sole physical custody of the children to their fathers; provided that D.T. would have alternate weekend visits, specified holidays and two weeks of summer vacation per year (assuming the children do not attend summer school); and required the fathers to facilitate phone calls between D.T. and the children. D.T. filed a timely notice of appeal from this order with respect to each of the three children on January 6, 2012.

DISCUSSION

On appeal, D.T. contends the juvenile court committed two reversible errors when issuing the order to dismiss this dependency matter on November 9, 2011. First, D.T. contends the juvenile court violated her rights to due process by refusing her request to testify at the contested hearing on issues relating to the court's exit order on custody and

visitation. Second, in a related argument, D.T. contends the exit order amounted to an abuse of discretion by the court because it was not consistent with the children's best interests. We address each contention in turn after setting forth the relevant standard of review.

I. Standard of Review.

A juvenile court has broad discretion in deciding matters of custody and visitation in dependency proceedings, including matters relating to the admissibility of evidence. (*In re Cole C.* (2009) 174 Cal.App.4th 900, 911; *In re S.A.* (2010) 182 Cal.App.4th 1128, 1135.) Relevant here, a juvenile court may, on its own motion, issue a so-called "exit order" with respect to custody or visitation issues when terminating jurisdiction over a minor.[1] (§ 362.4.) When issuing an exit order, the juvenile court must focus on the child's best interests, including the child's need for stability, based on the totality of circumstances. (*In re Jennifer R.* (1993) 14 Cal.App.4th 704, 712.)

Juvenile court orders are reviewed for abuse of discretion. Juvenile court orders will not be overturned on appeal "unless the [juvenile] court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318. See also *In re Cole C.*, *supra*, 174 Cal.App.4th at p. 911 [the proper test for abuse of discretion is whether the juvenile court, in ruling, "exceeded the bounds of reason"].) Further, when two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the juvenile court. (*In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319.)

II. The Juvenile Court's Rulings.

As set forth above, D.T. contends the juvenile court abused its discretion and violated her due process rights by denying her request to testify at the November 9, 2011

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[1] Section 362.4 provides in relevant part: "When the juvenile court terminates its jurisdiction over a minor who has been adjudged a dependent child of the juvenile court . . . the juvenile court on its own motion, may issue . . . an order determining the custody of, or visitation with, the child."

contested hearing with respect to the issues of child custody and visitation. In addition, D.T. contends the juvenile court's subsequent exit order when dismissing the case was an abuse of discretion. According to D.T., the juvenile court's rulings, rendered without the benefit of her testimony, were based on outdated information regarding "the children's circumstances and the reasons why jurisdiction should have been retained."

In challenging the juvenile court's initial decision to refuse her request to testify at the contested hearing, D.T. relies on the fundamental legal principle that " '[o]ne of the elements of a fair trial is the *right to offer relevant and competent evidence on a material issue*. Subject to such obvious qualifications as the court's power to restrict cumulative and rebuttal evidence . . . , and to exclude unduly prejudicial matter [citation], denial of this fundamental right is almost always considered reversible error. [Citations.]' (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 3, pp. 28–29, italics added.) Ordinarily, parties have the right to testify in their own behalf [citation], and a party's opportunity to call witnesses to testify and to proffer admissible evidence is central to having his or her day in court. [Citations.]" (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1357.)

We, of course, agree that, under certain circumstances, refusing a party's request to testify may amount to a due process violation. However, as has often been recognized: " '*Due process is a flexible concept which depends upon the circumstances and a balancing of various factors*. [Citation.] *The due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court*. [Citations.]' " (*In re Tamika T*. (2002) 97 Cal.App.4th 1114, 1120.) Thus, "[d]ue process requires a balance. [Citation.] The state's strong interest in prompt and efficient trials permits the nonarbitrary exclusion of evidence (see *Washington v. Texas* (1967) 388 U.S. 14, 22-25 [87 S.Ct. 1920, 1924-1926, 18 L.Ed.2d 1019]), such as when the presentation of the evidence will 'necessitate undue consumption of time.' (Evid. Code, § 352.) [Moreover, the] due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court. (*People v. Marshall* (1996) 13 Cal.4th 799, 836 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *People v. Burrell-Hart*

(1987) 192 Cal.App.3d 593, 599 [237 Cal.Rptr. 654].)" (*Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1146-1147.) With these principles in mind, we turn to the relevant facts.

The record in this case reflects that, before ruling, the juvenile court permitted D.T.'s counsel to make an offer of proof with respect to her proposed testimony. In response, D.T.'s counsel offered the following: "My client wanted to have the opportunity to tell the Court what she has been doing and how the visits have been going and how the relationship between herself and the fathers have been going in terms of the exchange. That was one of the big issues that the social worker had about increasing visitation. [¶] She's asking for an increase in visitation, and she's asking to have the Court consider a different custody order, exit order, if you will; and it is very brief. It would be why she's concerned about the present order and why she would like a different order, and I don't think it would take more than ten minutes."

Later D.T.'s counsel added: "[S]he's not really objecting to the dismissal but it is more as to the exit order. She wanted to give her statement or testimony regarding her desires to the Court and also – despite what the Court just said the last time we heard live testimony or heard from the [social] worker was in August, and according to her things have actually improved."

As an initial matter, we note that, as D.T.'s offer of proof reflects, she was not challenging the juvenile court's decision to dismiss the case; rather, she wanted to testify in opposition to the juvenile court's proposed custody and visitation exit order that was accompanying the dismissal. With respect to the precise subject matters raised in D.T.'s offer of proof – to wit, her desire for increased visitation in the exit order and her observations regarding improvements she had made with respect to her relationship with the children – the record is replete with instances where the juvenile court has, over the last two or more years, heard extensive testimony and reviewed other evidence relating to

just these issues.[2] In fact, at the very hearing at which D.T. sought to testify (albeit before the hearing was continued several times), her counsel had ample opportunity to examine the agency's witness, social worker Azeb Michael, regarding these same issues and, in particular, regarding Michael's reluctance about increasing D.T.'s visitation given the added disruption it would cause in the children's lives.

D.T.'s counsel also had ample opportunity to present argument before the court issued the exit order and dismissed the case on the issues of both custody and visitation. Most significant for our purposes, counsel argued for "joint physical custody with the primary caretaking to be with the fathers." In doing so, counsel acknowledged that, in actuality, D.T. wanted "the matter [of custody] to remain the status quo" and was requesting joint physical custody solely as a "guarantee" that the fathers would not take the children out of state without her permission (which had occurred at least once in the past).[3] In addition, counsel argued for one additional weekend of visitation per month, a request readily agreed to by the twins' father but objected to by Greg Jr.'s father on the ground that it would interfere with Greg Jr.'s bonding with his baby sister. D.T.'s counsel then responded to the fathers' positions by stating she was "sure [DT] would consider if [Greg Sr.] didn't want to give up another day or if he didn't want to give up a weekend," and that "the specific exit order should [not] say two weekends a month. Perhaps there should be language to be inserted that 'if the parties agree,' that that should be stated. . . . If they can agree to something else, that can be incorporated without going to mediation."

After argument concluded, the juvenile court commended D.T. for coming into compliance with her case plan and offered its support for increased visitation should the parties themselves agree to it. Then, the juvenile court crafted an exit order before dismissing the case that in all practical effect gave D.T. everything she asked for.

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[2] The parties also participated in three mediations that addressed and, in fact, resulted in agreement with respect to visitation.

[3] Counsel reiterated, however, that D.T. was not challenging the proposed dismissal of this case.

Specifically, the court's order (1) addressed D.T.'s concern about the fathers leaving the state with the children without telling her by requiring them, if they change a child's residence for more than 30 days, to provide notice to D.T., and (2) addressed her by-all-means accommodating request for more visitation by keeping the visitation schedule the same (with D.T. having alternate weekends, major holidays and two weeks in the summer) with the express caveat that this schedule was "a minimum" and that the parties could mutually agree to more days.

Thus, given that D.T. effectively received all that was requested on her behalf by her counsel at the contested hearing, we conclude the juvenile court's decision to preclude D.T. from presenting further testimony on the issues of visitation and custody resulted in no due process violations. Moreover, we conclude for primarily the same reasons that the court's final exit order was well within the broad scope of its discretion. Simply put, based on the entire lengthy record of these dependency proceedings, the juvenile court could reasonably doubt D.T.'s ability to offer additional probative, noncumulative evidence with respect to custody or visitation. In addition, the court could reasonably conclude, particularly in light of the parties' mutual agreement that the children were no longer at risk of harm, that the children did not need its continued protection and that any future issues with respect to custody or visitation would be better addressed in family court.[4] (See *In re Sarah M.* (1991) 233 Cal.App.3d 1486, 1502,

[4] We briefly address D.T.'s argument on appeal that her testimony would have "shed light on the abuse the children were receiving from the fathers." D.T. disregards, first, that her own offer of proof mentions nothing about child abuse. Rather, D.T.'s offer of proof merely stated her intent to testify regarding her requests for additional visitation and "a different custody order," and regarding the improvements she had made in her relationships with the children and their fathers. The burden was on D.T. to make known to the lower court the substance, purpose, and relevance of her proposed testimony, and her failure to do so with respect to her allegations of abuse precludes our consideration of them on appeal. (Evid. Code, § 354, subd. (a); see also *id.*, §§ 403, subd. (a); see also *In re Mark C.* (1992) 7 Cal.App.4th 433, 445 ["[f]ailure to make an adequate offer of proof precludes consideration of the alleged error on appeal"]; *In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1124.) Moreover, D.T. disregards that the agency investigated the earlier allegations of abuse and found them untrue. In addition, both the agency and the

overruled on other grounds by *In re Chantal S.* (1996) 13 Cal.4th 196, 203. See also *In re John W.* (1996) 41 Cal.App.4th 961, 971 [noting the different roles assumed by the juvenile and family courts with respect to custody issues, with the former concerned with "determining the best interests of the child" and the latter "determining the best interests of the child *as between* two parents"].)

As our colleagues in the Court of Appeal's Fourth District, Division Three have noted, there is a "strong public interest in preventing the juvenile dependency system from being used to subsidize private child custody disputes." (*In re John W.*, *supra*, 42 Cal.App.4th at p. 969.) "It is common knowledge that the resources of local government social service agencies are stretched thin; in the juvenile dependency context those resources are manifestly intended to be directed at neglected and genuinely abused children. [¶] . . . [T]he misuse of the juvenile dependency system to litigate custody battles is not only unfair to taxpayers, but to litigants as well." (*Id*. at p. 975.)

DISPOSITION

The order is affirmed.

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Siggins, J.

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children's counsel supported dismissal of the case with sole physical custody to the fathers and, indeed, her own counsel acknowledged to the court that living with the fathers was "beneficial" to the children. Had there been reliable evidence the children were being abused by or otherwise placed in danger by their fathers, the agency, the children's counsel and D.T.'s counsel would not have taken these positions.